

JOHN M. STOUT

IBLA 91-39 Decided August 22, 1995

Appeal from a decision of the Anchorage District Office, Bureau of Land Management, issuing a right-of-way grant for a road and dismissing a protest against the right-of-way. AA-58525.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A BLM decision granting a reciprocal grant right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1988), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

APPEARANCES: John M. Stout, pro se; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

John M. Stout has appealed from the September 20, 1990, decision of the Anchorage, Alaska, District Office, Bureau of Land Management (BLM), issuing right-of-way grant AA-58525 for an existing road to private property in the vicinity of Eagle River Road, behind the Eagle River Visitors Center, within secs. 9, 10, and 15, T. 13 N., R. 1 E., Seward Meridian, to the Gateway Homeowners Association (GHA), and dismissing Stout's protests against the right-of-way.

GHA filed the right-of-way application on April 22, 1986. GHA described the requested grant as follows:

Authorization is hereby requested to use an existing road for legal access to a number of private properties. This road is used on a year round basis. It was constructed to provide access

to a land entry patented under number 50-73-0154. Approximately 1/2 mile of the road crosses land owned by the United States. A term of 20 years with the right of renewal is requested.

On July 31, 1986, Stout filed a protest against the right-of-way application on behalf of the Section 15 Home Owners Association. He asserted that "a small war * * * has erupted from some members of another home owners association [GHA] which wants to turn this road into a private playground." He claimed that GHA was "trying to dictate just where the road is to go," and has "applied for a permit from BLM." He complains that

Section 15 Home Owners Association was not consulted, and neither were we. I particularly protest their determining the route of the road, and the granting of a permit by BLM to them, without adequate public hearing, so that once and have their use to this public land.

Stout proposed that BLM situate the road so that it would not pass through private property. He further proposed that BLM "return the request for the permit until that request has been cleared through the road advisory board, and then returned to the state park for their comments." He made clear that he was not submitting "an application for a permit"; rather, he characterized his submission as "a protest for a route selection for a permit and a procedure which BLM is following, which is outside of its management jurisdiction."

The record contains a memorandum to the file from Russ Blome, Anchorage District Office, BLM, concerning his meeting on May 15, 1987, with representatives of GHA. The memorandum indicates that GHA did not want the right-of-way to be a public road, and that the members of GHA had voted unanimously to keep the road private. BLM informed them "that BLM does not issue exclusive rights-of-way," but "retain[s] the right to require common use of the r/w and the right to authorize use of the right-of-way for compatible uses," citing 43 CFR 2801.1-1(a)(2) 1/ and 2801.1-1(f) 2/

1/ 43 CFR 2801.1-1(a)(2) provides:

"(a) All rights in public lands subject to a right-of-way grant or temporary use permit not expressly granted are retained and may be exercised by the United States. These rights include, but are not limited to: * * * *

(2) The right to require common use of the right-of-way, and the right to authorize use of the right-of-way for compatible uses (including the subsurface and air space)."

2/ 43 CFR 2801.1-1(f) provides:

"The holder of a right-of-way grant may authorize other parties to use a facility constructed, except for roads, on the right-of-way with the prior written consent of the authorized officer and charge for such use. In any such arrangement, the holder shall continue to be responsible for compliance with all conditions of the grant. This paragraph does

Moreover, BLM indicated that "[a]s a condition to BLM granting a r/w to them, [it] would require them to show easements from all the [private] property holders whose land the road crosses." It was agreed that such easements "plus a BLM r/w grant issued to the Gateway Homeowners Assoc. would show a continuous chain of access." BLM further suggested the possibility of a "reciprocal grant" pursuant to which the private landowners would grant to the United States an equivalent right-of-way, so that "BLM would be able to cross private lands to continue to administer its programs on public lands." GHA agreed to consider the possibility.

In addition, the file contains a memorandum to the file from Blome describing a meeting on May 15, 1987, between Blome and several individuals, including the Director of Chugach State Park and the Ranger at the Eagle River Visitors Center, concerning GHA's right-of-way application. The memorandum includes the following:

The State's position, in general, concerning the road is that they favor the existing alignment. They [the State] would object to any new construction on federal land. They believe this road should not be open to the general public. To allow this to be a public road would, in effect, move the trail head to the vicinity of the Barclay City subdivision in sec. 15, T13N, R1E, S.M. Moving the trail head is not in accordance with the Chugach State Park's plan or management objectives.

The participants at the meeting agreed (1) not to address at that time Stout's proposal to widen the road, given that BLM officials had provided Stout the necessary forms to apply for a right-of-way, but he had failed to submit it; (2) with regard to GHA's application, BLM would require all the property owners whose land the road crosses to show easements (or other proper permission); (3) BLM would consider issuing a reciprocal grant whereby the property owners would give the United States, and ultimately the State of Alaska, permission to cross GHA members' private property for continued administration of public lands in the area; and (4) State Parks has no authority to issue "non-compatible use permits" for roads within Chugach State Park, since BLM is the proper authorizing agency.

The record contains a memorandum to the file concerning a meeting on May 26, 1987, between Blome and officials of the Municipality of Anchorage (MOA) and Chugach State Park. MOA and Park officials agreed that the road should not provide public access. MOA's position is described below:

fn. 2 (continued)

not limit in any way the authority of the authorized officer to issue additional right-of-way grants or temporary use permits for compatible uses on or adjacent to the right-of-way, nor does it authorize the holder to impose charges for the use of lands made subject to such additional right-of-way grants or temporary use permits."

The MOA would not favor applying for a r/w on the road to make it public. The MOA sees it as a land manager's issue and that BLM and Chugach St. Park should review the application under their appropriate procedures. The only way the MOA would be involved is in the enforcement of minimum road standards. Both State Parks and BLM concur. If Mr. Stout also applied the MOA's response would be the same. The MOA's response would still be the same even in light of the fact they allowed Barclay City subdivision south of the visitor's center at the terminus of the road in question without proper legal access.

The participants were in agreement "that if and when Mr. Stout files a r/w application for the road, BLM would process his r/w application with the same requirements the Gateway Homeowners has to meet."

With periodic advice from the Solicitor's Office, BLM proceeded to process GHA's right-of-way application in accordance with the procedures outlined in Instruction Memorandum No. 85-560 (July 19, 1985), concerning "Reciprocal Right-of-Way (R/W) Grant Procedures." ^{3/} By letter dated June 2, 1988, the Anchorage District Manager, BLM, transmitted drafts of four nonexclusive road easements to Stuart Hirsh, President of GHA, whereby four homeowners would grant to BLM an easement for "full use as a road * * * for administrative purposes."

By memorandum dated October 3, 1988, the Anchorage District Manager transmitted to the Alaska Regional Solicitor for his review the nonexclusive road easements and preliminary title insurance policies from the four homeowners who were required to grant easements to the United States as a condition of GHA's receiving a reciprocal right-of-way grant from BLM. Also included was a copy of the revised by-laws of GHA, showing that one of its purposes is to apply for and hold rights-of-way providing legal access to properties owned by members of GHA.

By memorandum dated March 7, 1989, the Acting Regional Solicitor informed the Alaska State Director that he deemed the title insurance to be inadequate in two of the four proposed easement acquisitions. A number of corrective actions were taken in response to his recommendations, and

^{3/} BLM is authorized to issue a reciprocal right-of-way grant under 43 CFR 2801.1-2, which provides:

"When the authorized officer determines from an analysis of land use plans or other management decisions that a right-of-way for an access road is or shall be needed by the United States across lands directly or indirectly owned or controlled by an applicant for a right-of-way grant, he or she shall, if it is determined to be in the public interest, require the applicant, as a condition to receiving a right-of-way grant, to grant the United States an equivalent right-of-way that is adequate in duration and rights."

on May 26, 1989, the documentation was again sent to the Acting Regional Solicitor for his review, who by memorandum dated June 6, 1989, again requested additional information.

By letter dated July 24, 1989, BLM transmitted to GHA the right-of-way grant offer for the access road and driveways, explaining that upon receipt of the signed grant offer, BLM would issue the right-of-way grant. In this letter, BLM addressed Stout's protest against the right-of-way:

At issue is the controversy whether the road should provide public access or restricted access. The road is not managed or maintained by the Municipality of Anchorage. Further, the Alaska Department of Natural Resources has given BLM a non-objection to the proposed Right-of-Way grant in accordance with ANILCA Section 906(k) (94 Stat. 2441) conditioned that the road will not be open to the public. BLM reasons that Chugach State Parks controls physical access across their Eagle River Visitor Center lands, and also has the management authority transferred to them by the Cooperative Recreation Management Agreement between the Bureau of Land Management and the State of Alaska, Division of Parks (AG-50910-139, May 23, 1972). Therefore, BLM will issue a non-exclusive right-of-way grant for the portions of the road under their interim management, as the State of Alaska, Division of Parks has adequate authority to control access. BLM will dismiss this protest simultaneously with the decision to grant the R/W when the signed BLM form 2800-14 is transmitted.

BLM mailed a copy of this letter to Stout, who again protested by letter dated July 27, 1989. He stated that in 1981 he was given "public access across the parking lot in an MOA between Chugach State Park and [him]self." He questioned "[t]he legality of the very existence of the Gateway Homeowners Association." He stated that when he purchased his property "the road * * * was open to the public, without going through private property."

By letter dated August 8, 1989, BLM responded to Stout's protest, stating that

the State of Alaska Division of Parks and Outdoor Recreation (DPOR) controls access in [Stout's] neighborhood because they own the land at the Eagle River Visitor's Center upon which the existing access road rests. Further, they are empowered by the Cooperative Recreation Management Agreement between DPOR and the Bureau of Land Management (BLM), signed in 1972 (AG-50910-139, May 23, 1972), to manage the State-selected lands for recreational values as part of the Chugach State Park. DPOR admittedly does not have permit authority on federal lands, or even park lands subject to the 1972 agreement. DPOR has authority to issue only one (1) year use permits on

State-owned land such as the acreage at the Eagle River Visitor's Center. The Alaska Department of Natural Resources is the appropriate authority for you to obtain a long term authorization across State land. The fact that there is a section line nearby which is suitable for appropriation as a roadway easement is still subject to the control of DPOR. To go a step further, even BLM cannot grant a right-of-way across State-selected land without the concurrence of the State (ANILCA Section 906k, 94 Stat. 2441).

BLM informed Stout that the Acting Regional Solicitor had reviewed GHA's by-laws and had found GHA eligible to hold a right-of-way. Further, BLM informed Stout:

According to our records, you were advised of the processes necessary and given the forms and directions for the filing of a right-of-way application at least as early as May 1987. A search of our records showed that we have never received an application from you. We request that you furnish us with a copy of any application you had filed and a copy of your canceled check to BLM for processing the application.

Finally, BLM stated that the options proposed in Stout's letter were not available to BLM, but should be discussed with DPOR and DNR.

On September 20, 1990, BLM issued the right-of-way to GHA and dismissed Stout's protest. BLM noted that the four nonexclusive road easements from the affected private land-holders had been furnished to BLM guaranteeing administrative access to the United States. In its decision, BLM considered and rejected the various arguments advanced by Stout in his protests. We set forth BLM's analysis below:

1. Mr. Stout protests the present routing of the road across private and federal land. The routing across private lands precludes public access. Mr. Stout favors public access across federal land. The land report did not identify or recommend an alternative alignment because moving the road would be more costly and disruptive than maintenance of the existing route. The original road was located almost entirely upon federal land but was moved to its present location at the request of CSP authorities. Chugach State Park authorities do not want the road to be a public road because they will likely have to relocate their headquarters.

Two governmental authorities most appropriate to pursue a public right-of-way include the State Department of Transportation and Public Facilities, and the Municipality of Anchorage (MOA). Neither have come forth with a proposal or application to make the road a public right-of-way. The MOA

has stated it is not interested in the responsibility of developing access at the subject location. Further, the appropriate GHA members have provided access to all other homeowners including Mr. Stout, in the affected area where the road crosses private land. Gateway Homeowners Association opposes a public road. Mr. Stout could also file a right-of-way application for the existing road or a new alignment for public access. To date Mr. Stout has not filed a right-of-way application.

2. Mr. Stout protests the issuance of a right-of-way without adequate public hearing. The BLM may hold public hearings [43 CFR 2802.4(e)], but hearings are not mandatory. The proposed action of authorizing an existing use that only one individual questioned did not seem to warrant the time and expense for a public hearing.

3. Mr. Stout protests the issuance of a private right-of-way. The BLM reserves the right to authorize use of the right-of-way for compatible purposes [43 CFR 2801.1-1(a)(2)]. Therefore, this right-of-way is not a private right-of-way. Additionally, BLM cannot dictate the use, control or access across private lands.

4. Mr. Stout protests the issuance of a right-of-way without clearance through the Section 15 Homeowners Association. Mr. Stout has been afforded several opportunities personally as well as the chairman of the Section 15 Homeowners Association to participate in the process. He has provided comments and letters to BLM for consideration.

5. Mr. Stout asserts BLM has no authority to issue a right-of-way since the road is within [Chugach State Park]. The land status of the road is both private and federal. However, all the land (road) concerned is within the [Chugach State Park]. Chugach State Park manages the federal lands for recreational values according to the Cooperative Recreation Management Agreement (AG-50910-139 of 5-23-72). The BLM retained the authority to issue use authorizations. The State must issue access permits across State land.

6. Mr. Stout questions the legality of GHA to receive a right-of-way grant. On March 17, 1988, and on September 7, 1990, the Regional Solicitor verified the GHA qualifies for a right-of-way grant.

(BLM Decision at 1-2).

[1] Section 501(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(6) (1988), grants the Secretary of the

Interior discretionary authority to issue rights-of-way over, upon, under, or through public lands for roads, trails, or other means of transportation. See also 43 U.S.C. § 1761(a)(7) (1988). Approval of rights-of-way is, therefore, a matter of discretion. E.g., Coy Brown, 115 IBLA 347 (1990); Ben J. Trexel, 113 IBLA 250 (1990); Glenwood Mobile Radio Co., 106 IBLA 39 (1988); High Summit Oil & Gas, Inc., 84 IBLA 359, 92 I.D. 58 (1985).

Departmental regulations provide that an application may be denied if the authorized officer determines that the proposed right-of-way would not be in the public interest. See 43 CFR 2802.4(a)(2). When unusual circumstances dictating another result are not shown, this Board will affirm a BLM decision granting a right-of-way application if the record demonstrates that the decision is based upon a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason is shown to disturb BLM's decision. E.g., Coy Brown, supra; Robert M. Perry, 114 IBLA 252 (1990); Ben J. Trexel, supra; Glenwood Mobile Radio Co., supra.

Contrary to Stout's arguments, the record indicates that BLM carefully analyzed the facts relevant to GHA's application, and concluded that the right-of-way was in the public interest. It coordinated its review with the State of Alaska, the Chugach National Park, the MOA, and the Solicitor's Office. BLM considered various alternatives, including Stout's suggestion that BLM issue a public right-of-way, but based upon its review and consultations with the other officials, as reflected in the memoranda quoted above, BLM determined it to be in the public interest to grant to GHA a reciprocal grant right-of-way pursuant to 43 CFR 2801.1-2. BLM considered Stout's objections and arguments throughout the process of reviewing the right-of-way, and offered thorough and reasonable responses to his protests. Based upon our review of the record, we conclude that BLM properly issued the right-of-way to GHA.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Byrnes
Chief Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

